2-639

FILE COPY

Supreme Court, U. S.
FILED
OCT 26 1972
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-639

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

versus

SUTTON'S STEEL & SUPPLY, INC., SUTTON'S PROPERTIES, INC. and LIONEL H. SUTTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Davidson, Meaux, Onebane
& Donohoe
P. O. Drawer 3507
Lafayette, Louisiana 70501
Phone 318-233-2111

Counsel for Petitioner

TABLE OF CONTENTS

	Page
JURISDICTION	2
QUESTIONS PRESENTED	2
STATE LAWS INVOLVED	4
STATEMENT OF FACTS	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	16
CERTIFICATE	16
APPENDIX A	1a
APPENDIX B	22a
APPENDIX C	23a

TABLE OF AUTHORITIES

Cases:

Blair vs. Cleveland Twist Drill Co., 197 F.2d 842 12

Booth-Kelly Lumber Co. vs. Southern Pacific Co., 183 F.2d 902 12

Chicago, Rock Island Pacific Ry. Co. vs. Chicago & N.W. Ry. Co., 280 F.2d 110, 115 (8th Cir. 1960) cert. denied, 364 U.S. 931, 81 S.Ct. 378, 5 L.Ed.2d 364 12

Fidelity & Casualty Company of New York vs. C-B Mr. Kim, 5th Cir., 1965, 345 F.2d 45 13

Fort Worth & Denver Ry. Co. vs. Threadgill, 228 F.2d 307 (5th Cir. 1955, Texas) 9, 10, 11

Gardiner vs. Erskine, 170 La. 212, 127 So. 604 5

TABLE OF AUTHORITIES (Continued)

Page

Granger vs. General Motors Corp., 171 So. 2d 720 7

Kennedy vs. Pennsylvania Railway Co., 282 F.2d 705 (3rd Cir. 1960) 8, 10, 12

Mallard vs. State, 194 So. 447 (La. App. 2d Cir. 1940) 13

Missouri Pacific Railroad Co. vs. Southern Pacific Co., 430 S.W. 900 (1958) 11

Orleans Parish School Board vs. Pittman Construction Co., 244 So. 25 641, 4th Cir., 1971..... 13

Page vs. Cameron Iron, Inc., 5th Cir. 1958, 259 F.2d 420 13

Panichella vs. Pennsylvania Ry., 167 F.Sup. 345, reversed on other grounds, 268 F.2d 72 (1959), cert. denied, 361 U.S. 932, 80 S.Ct. 370, 4 L.Ed. 553 10

Patterson vs. Pennsylvania Ry., 197 F.2d 252 (2d. Cir. 1952) 12

Phillips vs. Houston Fire and Casualty Insurance Company, 219 F.Supp. 420 ..... 6, 7, 12

Reid vs. Lowden, 192 La. 811, 189 So. 286..... 5, 6

Reynolds vs. Southern Railway Company, 320 F.Sup 1141 ..... 7, 10

Rogers vs. Stuyvesant Insurance Company, 198 So.2d 685, (La. Ap. 1st Cir. 1967) writ granted, 251 La. 42, 202 So.2d 655 (1967)..... 6

TABLE OF AUTHORITIES (Continued)

Page

Seaboard Airline Ry. Co. vs. American District Electric Protective Co., 106 Fla. 330, 143 So. 316 (1932) 8

Smith vs. Southern Farm Bureau Casualty Insurance Co., 247 La. 695, 174 So.2d 122 ..... 13, 14, 16

Southern Ry. Co. vs. Foote Mineral Co., 384 F.2d 224 11

Spielman vs. New York, New Haven & Hartford Ry. Co., 147 F.Sup. 451 (DC NY 1956) 8

Succession of Harz, 181 So.2d 272 (La. App. 4th Cir.) 13

Succession of Pizzillo, 223 La. 328, 65 So.2d 783 13

Tucker vs. Reading Company, 335 F.Sup. 1269 (E.D. Pa. 1971) 8

Zontelli Bros. vs. Northern Pacific Ry., 263 F.2d 184 (8th Cir. 1959) 12

Miscellaneous:

Annot., 19 A.L.R. 3rd, 928 (1968) 9, 12

Federal Employers Liability Act ..2, 4, 5, 6, 7, 8, 9, 11, 12

Louisiana Civil Code, Art. 2105 ..... 4, 15, 16

Louisiana Civil Code, Art. 2324 ..... 4, 5, 6

Louisiana Civil Code, Art. 3536 ..... 2, 4

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1972

No.

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
Petitioner,

versus

SUTTON'S STEEL & SUPPLY, INC., SUTTON'S
PROPERTIES, INC. and LIONEL H. SUTTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Southern Pacific Transportation Company, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on June 9, 1972. The appellate decision affirmed the decision of the Lower Court on the basis of the District Court's decision. The opinion of the Fifth Circuit as well as that of the District Court appears at Appendix A. infra, p. 15.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was rendered on June 9, 1972. A rehearing was applied for on July 11, 1972, within the extended delay to July 12, 1972, granted by the Court. On August 15, 1972, the Fifth Circuit denied the rehearing. This petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Robert Brenham, an employee of Southern Pacific Transportation Company, (hereafter called "Southern Pacific") was injured on December 8, 1964, when he was walking along the railroad right-of-way and tripped and fell on some junk negligently placed on the right-of-way by third party defendants whom we will collectively designate "Sutton". The prescriptive period for filing tort claims in Louisiana is one year.[1] However, Brenham did not elect to file a lawsuit within the one year prescriptive deadline and, instead, waited until April 3, 1967, at which time he sued his employer, Southern Pacific, under the provisions of the Federal Employers Liability Act. On May 9, 1967, Southern Pacific answered and filed a third party claim against the Suttons seeking indemnity and, alternatively, contribution. The plaintiff's claim against Southern Pacific was settled prior to the trial but the third party claim was tried before a jury in the Lafayette Division

---

[1]Louisiana Civil Code, Art. 3536.

of the United States District Court for the Western District of Louisiana. The jury found that the Suttons were guilty of negligence which was a proximate cause of the accident and because he had not asked the jury the specific question concerning the negligence of Southern Pacific, the District Judge held that Southern Pacific was also guilty of negligence which was a proximate cause of the accident. Although the District Court denied Sutton's pretrial motion to dismiss the third party demand because of prescription, it nevertheless ruled that notwithstanding the finding of joint negligence by the jury, that Southern Pacific had no viable claim for contribution against the Suttons. The decision of the District Court was apparently based on the fact that the plaintiff did not sue the Suttons within one year following the accident.

The questions presented for decision are:

1. Whether the plaintiff in a Federal Employers Liability Act case can delay the filing of his petition and thereby deprive his employer of his just contribution from a jointly negligent tort-feasor?

2. Whether joint responsibility should be denied simply because of the different nature of the obligations owed by an F.E.L.A. employer and an ordinary tort-feasor?

3. Whether the Lower Court was correct in following its own earlier decision and disregarding clear Louisiana jurisprudence concerning the issue of solidarity?

STATE LAWS INVOLVED

Article 2324 of the Louisiana Civil Code:

> "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damages caused by such act."

Article 2105 of the Louisiana Civil Code:

> "In case the creditor has renounced his action in solido against one of the debtors, and one or more of the other co-debtors become insolvent, the portion of the insolvent shall be made up, by equal contribution, by all the debtors, and even those precedently discharged from the debt by the creditor in solido, shall contribute their part."

STATEMENT OF FACTS

As mentioned heretofore, although the plaintiff was injured on December 8, 1964, he did not file suit until April 3, 1967, almost three years after the accident occurred. Of course, this delay is permissible in suits filed against one's employer under the provisions of the F.E.L.A. However, Louisiana law prescribes a one-year statute of limitation for tort suits filed by an injured party against an ordinary tort-feasor. (La. Civil Code 3536). Thus, had the plaintiff sued Sutton in the original complaint, Sutton would doubtless have been dismissed upon the timely filing of a plea of prescription.

There is no serious question that under the terms of Louisiana Civil Code Article 2324, supra, Southern Pacific and Sutton were joint tort-feasors and were liable to the plaintiff in solido during the year following the occurrence of the accident. (*Reid vs. Lowden*, 192 La. 811, 189 So. 286 and *Gardiner vs. Erskine*, 170 La. 212, 127 So. 604) The question for consideration, therefore, is simply whether the plaintiff's delay in filing the suit against his employer deprives the employer of his contribution from a jointly negligent tort-feasor. In making that decision one must determine whether Sutton and Southern Pacific are liable "in solido" under Louisiana Law and whether the running of the one-year prescriptive period released Sutton from any obligation and destroyed whatever solidarity may have existed between the two tort-feasors.

It should be noted that there are no factual disputes presented for consideration to this Court. The jury determination that Sutton was proximately negligent has not been appealed and has become a final judgment. Similarly, the District Court held that Southern Pacific was proximately negligent and that conclusion is not being attacked.

Thus, the only issue for consideration is the legal question whether or not an F.E.L.A. employer should be allowed to recover contribution from a jointly negligent tort-feasor in a case in which the plaintiff filed his F.E.L.A. suit at a time when the applicable prescriptive period for suing the joint tort-feasor had lapsed.

REASONS FOR GRANTING THE WRIT

I.

This decision which denies contribution to an F.E.L.A. employer is contrary to virtually every other case, State and Federal, which has ever considered the issue.

The District Court devoted considerable attention to the question whether there could ever be solidary liability between an F.E.L.A. employer and a jointly negligent tort-feasor because of the difference in the obligation owed by each to the injured party. The District Court thought that F.E.L.A. liability for negligence "even the slightest" was substantially different from the ordinary obligation to use due care under Louisiana Law. In making that observation it relied on its earlier decision of *Phillips vs. Houston Fire and Casualty Insurance Company*, 219 F. Sup. 420, and disregarded Article 2324 of the Louisiana Civil Code and the Louisiana cases of *Rogers vs. Stuyvesant Insurance Company*, 198 So. 2d 685, (La. Ap. 1st Cir. 1967), writ granted, 251 La. 42, 202 So. 2d 655 (1967) and *Reid vs. Lowden*, 192 La. 811, 189 So. 286. In the Rogers case contribution was granted to a Jones Act employer against an ordinary tort-feasor notwithstanding the difference in the standard of care owed by each to the plaintiff. In the Reid case the Louisiana Supreme Court held that an F.E.L.A. employer was solidarilly liable with another tort-feasor notwithstanding the different standards of care. In this case the Court of Appeals was apparently impressed with the distinction because in approving the decision of the Lower Court it spe-

cifically cited with approval the *Phillips* case, supra, but ignored the above Louisiana decisions to the contrary as well as *Granger vs. General Motors Corp.*, 171 So. 2d 720, which held that a solidary obligation can arise jointly by tort and contract.

Pertinent in such a discussion is the decision in *Reynolds vs. Southern Railway Company*, 320 F. Sup. 1141, in which the Court makes a thoroughgoing review of the jurisprudence on this particular issue:

> "Contribution is allowable in F.E.L.A. cases, even though the liability of the defendant is statutory and that of the alleged joint tort-feasor may — as here — arise from common law. Contribution is dependent upon *common liability*, but the mere fact that liability arises from different sources does not preclude joint responsibility. As the Eighth Circuit put it in Chicago, R. I. & P. R. R. vs. Chicago & N. W. Ry., 280 F.2d 110, 115 (8th Cir. 1960) cert. denied, 364 U.S. 931, 81 S. Ct. 378, 5 L.Ed. 2d 364:
>
> > 'The essence of the action for contribution is *common liability* to the injured person, not liability for *common* negligence or *similar* negligence or *like* negligence. Simply stated, common liability means that each party, by reason of his wrongful act, is made legally liable to respond in damages to the injured party.'
>
> "While it is true that under F.E.L.A. the contributory negligence of the employee only mit-

igates damages, but may bar common law recovery against the third party defendant, this in itself is insufficient to destroy the requisite common liability required for contribution. Zontelli Bros. vs. Northern Pacific Ry., 263 F. 2d 184 (8th Cir. 1959). This is particularly true in Georgia, a comparative negligence state. Swift & Co. vs. Phelps, 273 F. 2d 551 (6th Cir. 1960). Even in states generally prohibiting contribution between tort-feasors, contribution has long been permitted in cases where the employer-railroad, under F.E.L.A., has been held liable to its employee. Annot., 19 A.L.R. 3d, 928 (1968).

"Thus, almost without exception, courts have uniformly permitted a defendant-railroad, such as Southern Railway, to receive contribution after an F.E.L.A. payment. Chicago & N.W. Ry. vs. Minnesota Transfer Ry., 371 F.2d 129 (8th Cir. 1967); Chicago, R.I. & P.R.R., supra; Patterson vs. Pennsylvania Ry., 197 F.2d 252 (2d. Cir. 1952); Gulf, Mobile & Ohio R.R. vs. Arthur Dixon Transfer Co, 343 Ill. App. 148, 98 N.E. 2d 782 (1951); Annot., 19 A.L.R. 3d 928 at Sec. 2."

For similar holdings see also *Kennedy vs. Pennsylvania Railway Co.*, 282 F. 2d 705 (3rd Cir. 1960); *Spielman vs. New York, New Haven & Hartford Ry. Co.*, 147 F. Sup. 451 (D.C. N.Y. 1956); *Seaboard Airline Ry. Co. vs. American District Electric-Protective Co.*, 106 Fla. 330, 143 So. 316 (1932); and *Tucker vs. Reading Company*, 335 F. Sup. 1269 (E.D. Pa. 1971). The Court's

attention is directed to an annotation entitled "Right of Railroad, Charged With Liability For Injury To Or Death Of Employee Under Federal Employer's Liability Act To Claim Indemnity Or Contribution From Other Tort-Feasors", 19 A.L.R. 3d 928. That annotation considers in detail all the cases which have allowed contribution by the railroad from third party tort-feasors under a host of different circumstances. Following that discussion, there is a section entitled, "Circumstances not permitting contribution", in which only three cases are discussed. The first is *Fort Worth & Denver Ry. Co. vs. Threadgill*, 228 F.2d 307 (5th Cir. 1955, Texas) in which The Fifth Circuit, applying Texas law, said the injured party was barred from recovery from the third party because of his contributory negligence in failing to keep a proper lookout, and that payment of contribution to the railroad from the third party would deprive the third party of its otherwise perfect defense. Contributory negligence, the Court noted, was not a bar to recovery by the employee from the railroad under the F.E.L.A. In a footnote, the Fifth Circuit recognized another possibility for denying the right of contribution, saying that where the liability of one defendant arises under the F.E.L.A. and that of the other defendant arises out of the breach of a common law duty of ordinary care, the liability does not arise from a breach of the same duty — and, therefore, there would be no common liability between the defendants.

The Court's holding in *Threadgill*, supra, has been cited subsequently for the proposition that there can be no contribution when the third party tort-feasor would have a valid defense such as contributory negligence. *Panichella vs. Pennsylvania Ry.*, 167 F. Sup.

345, reversed on other grounds, 268 F. 2d 72 (1959), cert. denied, 361 U.S. 932, 80 S. Ct. 370, 4 L.Ed. 553; *Kennedy vs. Pennsylvania Ry.*, supra.

In discussing the *Threadgill* case, the Atlanta District Court, in *Reynolds vs. Southern Railway Co.*, supra, considered in great detail the Fifth Circuit's holding as well as the dicta contained in the footnote and ruled that notwithstanding that, there are two causes of action, although based on different remedies, contribution should be granted:

> "We agree — and feel that the Fifth Circuit would also — that:
>
> > 'A general prerequisite for the recovery of contribution by the railroad from the third party is that there must be common liability to the injured person between the joint tort-feasors. This apparently does not mean that the source of liability — whether it be statutory or common law — must be the same, but means, simply stated, that each party, because of its wrongful act, is made legally liable to respond in damages to the injured party.'"

The Sixth Circuit has held, under Tennessee Law, there can be contribution between the railroad and a third party tort-feasor when a railroad switchman was killed by a rock falling from the third party's conveyor belt over the railroad's tracks because there was a "common burden or common liability" between the railroad and the mineral company even though the

liability of the railroad was prescribed by the F.E.L.A. and the liability of the third party was controlled by common law. *Southern Ry. Co. vs. Foote Mineral Co.*, 384 F. 2d 224.

Thus, the Fifth Circuit in *Threadgill*, supra, and in this case, is the only Circuit Court which even suggests that there may be a defense to a contribution claim based on the fact that there is a difference between the nature of the F.E.L.A. remedy and an ordinary common law remedy. In *Threadgill* the Court was considering the law of the State of Texas. Since the decision, the Courts of the State of Texas have spoken on the issue and have allowed contribution. In the case of *Missouri Pacific Railroad Co. vs. Southern Pacific Co.*, 430 S.W. 900 (1958), the Court of Appeals of Texas held that where a settlement with an employee was made by the F.E.L.A. employer more than two years after his cause of action had accrued and his cause of action against the Missouri Pacific was governed by the two-year statute of limitation, that Southern Pacific could recover from Missouri Pacific indemnity or contribution. The Court held that since Missouri Pacific did not become liable to the employee, the running of the statute of limitations did not extinguish that liability, but merely deprived the employee of his remedy of enforcing it and, therefore, Southern Pacific was entitled to indemnity from Missouri Pacific under the facts of that case. The significance of the decision, obviously, is that Texas Law will allow contribution and even indemnity between an F.E.L.A. employer and ordinary tort-feasors. Thus, *Threadgill*, which interpreted Texas Law before the Missouri Pacific case, loses its significance as a statement of controlling Texas Law.

At the time of this writing, the United States Circuit Courts for the 2nd, 3rd, 6th, 7th, 8th and 9th Circuits have all allowed contribution or indemnity, or both, in situations involving F.E.L.A. employers and ordinary tort-feasors. *Patterson vs. Pennsylvania Ry. Co.*, supra; *Zontelli Brothers vs. Northern Pacific Ry. Co.*, supra; *Chicago, Rock Island and Pacific Ry. Co. vs. Chicago & N.W. Ry. Co.*, supra; *Kennedy vs. Pennsylvania Ry. Co.*, supra; *Blair vs. Cleveland Twist Drill Co.*, 197 F.2d 842; *Booth-Kelly Lumber Co. vs. Southern Pacific Co.*, 183 F. 2d 902.

Furthermore, every State Court decision which this writer was able to find also allowed contribution or indemnity where it was determined that both defendants were tort-feasors, 19 A.L.R. 3rd, 928.

The only decision which has ever squarely held that there can be no contribution between an F.E.L.A. employer and a jointly negligent third party because of the difference in the nature of the remedies is the 1963 decision of the Lower Court in *Phillips*, supra. As indicated previously, that decision is contrary to virtually every other decision which has considered the same issue.

II.

In reaching the conclusion that there was no solidarity between the defendants because the plaintiff's case against the third party tort-feasor had prescribed, the District Court and The Court of Appeal have ignored the clear Louisiana jurisprudence holding that the lapse of the statute of limitations is merely a proce-

dural bar to recovery and does not destroy the right of action.

It is important to note that the Lower Court held that the third party demand of Southern Pacific had not prescribed since its third party action did not arise until such time as the plaintiff made its original claim against Southern Pacific. Yet, in a later paragraph, the Court has concluded that since the injured plaintiff's cause of action against Sutton had prescribed that, therefore, there could be no solidarity between the two defendants and hence no contribution. The Court holds, in effect, that the running of the prescriptive period has not barred Southern Pacific's remedy but has barred its right of action. This is precisely contrary to Louisiana Law which is controlling on that issue. In Louisiana, the running of a prescriptive period merely imposes a procedural bar to the remedy, but does not extinguish the right. *Succession of Pizzillo,* 223 La. 328, 65 So. 2d 783; *Fidelity & Casualty Company of New York vs. C-B Mr. Kim,* 5th Cir., 1965, 345 F. 2d 45; *Page vs. Cameron Iron, Inc.,* 5th Cir. 1958, 259 F. 2d 420; *Succession Of Harz,* 181 So. 2d 272 (La. App. 4th Cir.); *Mallard vs. State,* 194 So. 447 (La. App. 2d Cir. 1940); *Orleans Parish School Board vs. Pittman Construction Co.,* 244 So. 2d 641, 4th Cir., 1971.

In Louisiana the existence of a procedural bar between the original plaintiff and one co-defendant does not deprive the right of another co-defendant from his claim for contribution based on solidarity liability.

Smith vs. Southern Farm Bureau Casualty Insurance Co., 247 La. 695, 174 So. 2d 122 is a landmark

Louisiana Supreme Court decision involving a contribution claim. In that case, an injured passenger filed a direct action against the insurer of the vehicle driven by a third party and the insurer filed a third party demand against the passenger's husband for contribution claiming that her husband was a joint tort-feasor. In Louisiana, because of a statute granting interspousal immunity, the wife cannot sue the husband for daages. The immunity statute constitutes a procedural bar prohibiting a suit directly by the plaintiff against the third party defendant. However, notwithstanding the existence of this procedural bar, the Louisiana Supreme Court in 1965 allowed the insurer to recover on its third party demand against the husband because it held that the husband and the insurer were "solidary co-debtors" within the meaning of Louisiana Law. The Louisiana Supreme Court held that this procedural impediment, i.e. the immunity statute, which prohibited suit directly by the plaintiff against the defendant did not destroy the co-defendant's right to seek contribution on the basis of solidarity. In other words, the insurer of a co-defendant was allowed to recover against the husband under the doctrine of solidary co-debtors notwithstanding the fact that the plaintiff herself could never have sued the husband directly. There was a procedural bar which prohibited such a direct suit in *Smith* just as there is a procedural bar which prohibits a direct suit by the plaintiff in this case. The running of the statute of limitations is nothing more or less than a procedural bar to a cause of action.

To reach a different result is not only contrary to Louisiana jurisprudence, but, additionally, it is fundamentally unfair. To allow the plaintiff to wait until

one statute of limitation had run and to thereby defeat the remaining defendant's right of contribution from an equally negligent tort-feasor creates a fundamental injustice. In fact, the law of the State of Louisiana has been drafted to eliminate this very problem. The Court's attention is directed to Louisiana Civil Code Article 2105 which provides as follows:

> "In case the creditor has renounced his action in solido against one of the debtors, and one or more of the other co-debtors become insolvent, the portion of the insolvent shall be made up, by equal contribution, by all the debtors, and even those precedently discharged from the debt by the creditor in solido, shall contribute their part."

In other words, if a creditor unilaterally discharges the solidary obligation of one of his co-debtors and if later one of the other co-debtors becomes insolvent, those remaining co-debtors who are compelled to pay the share of the one which became insolvent can collect over against the one which the original creditor attempted to discharge. A creditor cannot unilaterally defeat the claim of a solidary co-debtor for its proportionate share of the solidary obligation. Particularly, it cannot do so unilaterally and for no consideration.

But, that is exactly what happened in this case. The plaintiff elected not to sue Sutton within the first year of his injury. During that one year there was absolutely nothing that Southern Pacific could have done to interrupt the running of prescription because no claim or demand had been made against it during that time.

Thus, by proceeding in the way he did, Brenham voluntarily discharged one co-debtor in solido and the Appellate Court has held that his election effectively prohibits collection of contribution by Sutton's co-debtor. That is directly contrary to the decision of *Smith vs. Southern Farm Bureau Casualty Insurance Co.*, supra, and contrary to the clear meaning of Article 2105 of the Louisiana Civil Code. Further, it is fundamentally inequitable and the result produces an illogical, harsh conclusion, which allows a plaintiff, at his whim, to create or defeat his defendant's third party claim for contribution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

DAVIDSON, MEAUX,
ONEBANE & DONOHOE
P. O. Drawer 3507
Lafayette, Louisiana 70501

RICHARD C. MEAUX

V. FARLEY SONNIER
COUNSEL FOR
PETITIONER

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Writ of Certiorari has been for-

warded this date to all Attorneys of Record by depositing a copy of same in the United States Mail, postage prepaid and properly addressed to said attorneys.

Lafayette, Louisiana, this ____ day of ____, 1972.

V. FARLEY SONNIER

APPENDIX A

Filed: JUN. 18, 1971

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

ROBERT O. BRENHAM

CIVIL ACTION

versus No. 12,783

SOUTHERN PACIFIC COMPANY

versus

SUTTON'S JUNK & SALVAGE YARDS, INC. and SUTTON'S STEEL & SUPPLY, INC. and LIONEL H. SUTTON and SUTTON INDUSTRIES, INC. (Third-Party Defendants)

FOR PLAINTIFF

Messrs.
Piccione, Piccione & Wooten,
Charles N. Wooten, Post Office
Box 3029, Lafayette, Louisiana

FOR DEFENDANT

Davidson, Meaux, Onebane & Donohoe,
Richard C. Meaux, Post Office Box
3507, Lafayette, Louisiana

FOR THIRD-PARTY
DEFENDANTS
Landry, Watkins, Cousin & Bonin,
William O. Bonin, Post Office
Box 850, New Iberia, Louisiana

R. J. PUTNAM, DISTRICT JUDGE

MEMORANDUM OPINION

Robert O. Brenham, a brakeman for Southern Pacific Company, injured his back on a piece of junk which was lying on the Railroad's right-of-way. At the time of the accident the train on which Brenham was working was on a spur track located within the boundaries of Sutton's Junk and Salvage Yard.

On April 3, 1967, Brenham filed suit against Southern Pacific Company under the F.E.L.A., 45 U.S.C. § 51 *et seq.*, alleging total and permanent disability. On May 9, 1967, Southern Pacific Company answered and impleaded Sutton's Steel & Supply, Inc. (formerly Sutton's Junk & Salvage Yards, Inc.), as a third party defendant. Southern Pacific seeks indemnity, or, in the alternative, contribution.

The Railroad alleges four grounds for its indemnity claim against Sutton's: (1) certain contracts, including a verbal agreement between Southern Pacific and Sutton's, under which Sutton's was obliged to refrain from placing or piling materials closer than six feet from the nearest rail of the spur track; (2) Sutton's breach of the warranty of workmanlike performance and failure to provide Southern Pacific with a safe place to

work; (3) indemnity on a tort or quasi-contractual theory, on the ground that Southern Pacific was only constructively at fault, while Sutton's was actually at fault; (4) Sutton's contractual obligation to maintain public liability and property damage insurance. Alternatively, Southern Pacific contends that if it is not entitled to indemnity, it is at least entitled to contribution.

Sutton's responded to the third party complaint by filing a motion to dismiss and a plea of prescription. These motions were denied on December 26, 1967. A subsequent motion to produce the original of one of the contracts upon which Southern Pacific was relying proved fruitless, whereupon Sutton's reurged its motions of dismissal and prescription. The motion to dismiss was denied, and the plea of prescription was referred to the merits.

On August 2, 1968, Southern Pacific impleaded Lionel H. Sutton and Sutton Properties, Inc., alleging that these parties had interfered with the Railroad's servitude, thereby causing it to incur liability toward Brenham.

On March 27, 1969, Brenham and Southern Pacific compromised, with the Railroad reserving its rights against the third party defendants.

The case went to trial on the third party demands. Pursuant to Rule 49(a), 28 U.S.C., Federal Rules of Civil Procedure, the jury returned special verdicts as follows:

INTERROGATORY NO. 1

Did Robert O. Brenham sustain an injury while working in the course of his employment with Southern Pacific Company, at the premises occupied by Sutton Steel & Supply, Inc., on December 8, 1964?
Answer: Yes

INTERROGATORY NO. 2

Was Southern Pacific Company guilty of negligence which played any part, even the slightest, in causing or bringing about the injury sustained by Mr. Brenham on December 8, 1964, in any of the following respects:

(a) in failing to provide him with a safe place to work, by requiring him to work on the side track at Sutton's yard when it knew or should have known that scrap material had accumulated within six feet of the track in areas where he would ordinarily have to walk?
Answer: Yes

(b) in failing to provide him a safe place in which to work by not providing additional lighting for him on December 8, 1964, under all of the circumstances of this case?
Answer: No.

INTERROGATORY NO. 3

Was Southern Pacific Company prevented from fulfilling its duty to furnish Mr. Brenham a reasonably safe place in which to work solely because of the actions or omissions of Sutton Steel & Supply Company, Inc., or any of its officers, employees or representatives?
Answer: No.

INTERROGATORY NO. 4

Was Lionel H. Sutton, individually, guilty of negligence which was a proximate cause of the accident of December 8, 1964, by causing or allowing scrap materials to accumulate within six feet of the track in areas where he knew or should have known that employees of Southern Pacific would ordinarily have to walk?
Answer: Yes.

[The jury likewise found in Interrogatories No. 5 and 6 that Sutton Steel & Supply, Inc., and Sutton Properties, Inc., were guilty of negligence which was a proximate cause of the accident.]

INTERROGATORY NO. 7

Was Robert O. Brenham himself guilty of negligence which played any part, even the slightest in causing or bringing about the injury sus-

tained by him on December 8, 1964, in any of the following respects:

(a) in failing to keep a proper lookout for his own safety?
Answer: Yes.

INTERROGATORY NO. 8

Was the negligence of Mr. Brenham a proximate cause of the injury he sustained on December 8, 1964?[1]
Answer: No.

INTERROGATORY NO. 9

What percentage of the cause of the accident did Mr. Brenham's negligence contribute?
Answer: 17%

INTERROGATORY NO. 10

What sum of money paid in cash today would fairly and reasonably compensate Robert O. Brenham for the injuries sustained by him as a direct or proximate result of the accident in question?
Answer: $25,000.00

---

[1]The term "proximate cause" is used here and throughout this opinion. Instructions to the jury in defining this term conformed to the Louisiana definition of "cause in fact" as announced and applied in Dixie Drive It Yourself System v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962); and Bertrand v. Missouri Pacific Railroad Co., 160 So. 2d 19 (La. App. 3d Cir. 1964), writ denied, 248 La. 1075, 162 So. 2d 571 (1964). We have used the term "proximate cause" as synonymous with "cause in fact" for the sake of uniformity.

INTERROGATORY NO. 11

Did Sutton Steel & Supply Company, Inc., subsequent to August 1, 1960, verbally agree with Southern Pacific Company that Sutton would not permit scrap material within six feet of the outside rail of the spur tracks located on its property where the railroad cars were to be spotted for loading or picked up for shipment? Answer: Yes.

The jury was asked only whether the Railroad's negligence was sufficient to invoke liability under the F.E.L.A., *i.e.*, whether its negligence played any part, even the slightest, in bringing about the accident. The jury was not asked to decide whether the Railroad's negligence was also sufficient to constitute a proximate cause of the accident. No request for a special verdict having been made before the jury retired, this Court exercises its power under Rule 49(a) to make that factual determination. Our appreciation of the evidence is that the Railroad's negligence in sending its men into Sutton's yard when it knew or should have known that the right-of-way was littered with scrap material constituted a proximate cause of the accident. Thus we expressly find that the Railroad was guilty of actual fault, as that term is understood in Louisiana law.

It is now settled beyond any doubt that a Railroad's right to recover indemnity or contribution from a third party for liability incurred under F.E.L.A. depends entirely upon state law. See, *e.g.*, *Ratigan v. New York Central Railroad Company*, 291 F. 2d 548 (2d Cir. 1961),

cert. denied, 368 U.S. 891, 82 S. Ct. 144, 7 L. Ed. 2d 89 (1961); *Chicago, Rock Island & Pacific Railroad Company v. Chicago & North Western Railway Company*, 280 F. 2d 110 (8th. Cir. 1960),cert. denied, 364 U.S. 931, 81 S. Ct. 378, 5 L. Ed. 2d 364 (1961); *Zontelli Brothers v. Northern Pacific Railway Company*, 263 F. 2d 194 (8th. Cir. 1959); *Chicago Great Western Railway Company v. Casura*, 234 F. 2d 441 (8th Cir. 1956); *Fort Worth & Denver Railway Company v. Threadgill*, 228 F. 2d 307 (5th. Cir. 1955); *Waylander-Peterson Company v. Great Northern Railway Company*, 201 F. 2d 408 (8th. Cir. 1953); *Patterson v. Pennsylvania Railroad Company*, 197 F. 2d 252 (2d Cir. 1952); *United States v. Chicago, Rock Island & Pacific Railway Company*, 171 F. 2d 377 (10th. Cir. 1948); *Chicago, Rock Island & Pacific Railroad Company v. Powers Foundation Drilling Company*, 294 F. Supp. 921 (W.D. Okla. 1968); *Illinois Central Railroad Company v. Standard Oil Company*, 292 F. Supp. 337 (S.D. Miss. 1968), *affirmed per curiam*, 403 F. 2d 1022 (5th. Cir. 1968); *Sleeman v. Chesapeake & Ohio Railroad Company*, 290 F. Supp. 830 (W.D. Mich. 1968), *affirmed*, 414 F. 2d 309 (6th. Cir. 1969); *Spielman v. New York, New Haven & Hartford Railroad Company*, 147 F.Supp. 451 (E.D. N.Y. 1956); *Flusk v. Erie Railroad Company*, 110 F. Supp. 118 (D. N.J. 1953); Annotation, *Right of Railroad, Charged With Liability Under Federal Employers' Liability Act, to Claim Indemnity or Contribution From Other Tortfeasor*, 19 A.L.R. 3d 928, 931 (1968).

Prescription

It is well established under Louisiana law that a claim for indemnity, whether based on contract, tort,

or quasi-contract theories, is prescribed by ten years. Louisiana Civil Code Article 3544; *Minyard v. Curtis Products, Inc.*, 251 La. 624, 205 So. 2d 422 (1967); *Edward Levy Metals, Inc. v. New Orleans Public Belt Railroad*, 243 La. 860, 148 So. 2d 580 (1963). Furthermore, prescription does not commence to run until a cause of action accrues. *South Arkansas Lumber Company v. Tremont Lumber Company*, 146 La. 61, 83 So. 378 (1919). In indemnity cases, the cause of action is held to arise only when the indemnitee has paid or has been condemned to pay the debt which the indemnitor should have paid. *Minyard*, supra; *Appalachian Corporation v. Brooklyn Cooperage Company*, 151 La. 41, 91 So. 539 (1922).

The Louisiana courts have apparently not yet decided whether the right to contribution between joint tortfeasors is governed by the one-year period or the ten-year period. However, that is immaterial in this case, since the third party defendants were impleaded before the Railroad paid the debt, that is, before the Railroad had a cause of action for contribution. Under the *South Arkansas* case, therefore, prescription had not even begun to run.

The motion to dismiss on the ground of prescription is therefore denied.

The Contractual Indemnity Claim

The Railroad was unable to produce the contract of November 1, 1906, upon which it principally relied for its contractual indemnity claim. However, a sup-

plemental agreement of August 1, 1960, was introduced in evidence. Other contracts relied on by the Railroad are the oral agreement to keep the tracks clear, as found by the jury in Interrogatory No. 11, and the contract of servitude.

Under Louisiana law, a contract is the law between the parties, unless the cause is *contra bonos mores*. Louisiana Civil Code, Articles 11, 1892, 1895, 1901, 1945. The Louisiana courts have not announced any clear public policy concerning indemnity and exculpatory clauses, but it is clear that the mere existence of such clauses does not violate public policy. See, *e.g.*, *Freeman v. Department of Highways*, 253 La. 105, 217 So. 2d 166 (1968) (exculpatory clause held not *per se* violative of public policy). Indemnity contracts are construed strictly, and it is not presumed that one party intended to indemnify the other party for the negligence of the latter unless such intention is clearly and unequivocally expressed. *Arnold v. Stupp Corporation*, 205 So. 2d 797 (La. App. 1st. Cir. 1967), *writ refused*, 251 La. 936, 207 So. 2d 540 (1968); *Jennings v. Ralston Purina Company*, 201 So. 2d 168 (La. App. 2d Cir. 1967), *writ refused*, 251 La. 215, 203 So. 2d 554 (1967); *Moore v. Liberty Mutual Insurance Company*, 149 So. 2d 192 (La. App. 3d Cir. 1963); *Buford v. Sewerage and Water Board*, 175 So. 110 (La. App. Orl. 1937); *Mills v. Fidelity & Casualty Company*, 226 F. Supp. 786 (W.D. La. 1964), *affirmed per curiam sub nom. Yuba Consolidated Industries, Inc. v. Fidelity & Casualty Company*, 338 F. 2d 341 (5th. Cir. 1964). But see *Hospital Service District No. 1 v. Delta Gas, Inc.*, 171 So. 2d 293 (La. App. 4th

Cir. 1965), *writ refused*, 247 La. 673, 173 So. 2d 540 (1965).

The contract of August 1, 1960, contains no express indemnity clause. Furthermore, under the rule of strict construction applicable to contracts of indemnity in Louisiana, we cannot presume that the third party defendants, in their agreement to keep the tracks clear, or in their contract of servitude, intended to assume liability for damages proximately caused by the Railroad's negligence. The claim for contractual indemnity is therefore denied.

Implied Contractual Indemnity

The Railroad has argued that it should be awarded indemnity because the third party defendants breached the warranty of workmanlike performance. This argument is based on the following articles of the Louisiana Civil Code:

> Article 1930. The obligations of contract extending to whatsoever is incident to such contracts, the party who violates them, is liable, as one of the incidents of his obligations, to the payment of the damages, which the other has sustained by his default.
>
> Article 2769. If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his noncompliance with his contract.

The Louisiana courts have recognized an implied warranty of workmanlike performance only in limited situations. This may be due to the fact that Article 2769 appears in a section of the Code dealing with construction of buildings and "other works by the job." Thus, for example, the courts have found warranties of workmanlike performance on the parts of a house-mover, a building contractor, and a plumbing subcontractor. *Hebert v. Pierrotti*, 205 So. 2d 888 (La. App. 3d Cir. 1968); *Wolfe v. LeVasseur-Hinson Construction Company*, 147 So. 2d 747 (La. App. 2d Cir. 1962); *Hunter v. Mayfield*, 106 So. 2d 330 (La. App. 2d Cir. 1958). All of these cases involved works by the job. There is one case, *Truxillo v. Gentilly Medical Building, Inc.*, 225 So. 2d 488 (La. App. 4th. Cir. 1969), which spoke of a janitorial service supplier as being impliedly obliged toward the building owner to perform his contract in such a way as not to expose the building owner to liability, even though the contract for janitorial services was presumably a contract for continuing services, rather than for a work by the job. The court cited no authority for its holding on this point, and the holding was not necessary to the decision of the case. Thus we do not regard *Truxillo* as establishing a right to indemnity on an implied warranty theory beyond the situations specifically covered in the Civil Code.

Even aside from these considerations, we believe that where the party seeking indemnity was guilty of negligence which proximately caused the damages, he cannot recover indemnity under the implied warranty theory. To hold otherwise would be to allow a person to do more through an implied contract than he could

do through an express contract, for, as we have seen, indemnification for negligence under an express contract must be based on a clear and unequivocal provision to that effect. See *General Electric Company v. Cuban American Nickel Company*, 396 F. 2d 89 (5 Cir. 1968).

The claim for indemnity based on implied contract is therefore denied.

Tort or Quasi-Contractual Indemnity

The case which is traditionally regarded as having established Louisiana's tort theory of indemnity is *Appalachian Corporation v. Brooklyn Cooperage Company*, 151 La. 41, 91 So. 539 (1922). That case held that a party only technically, constructively, or vicariously at fault could recover indemnity from the party whose actual fault was the proximate cause of the damage. Under this theory, it is clear that a party who is guilty of actual fault is precluded from recovering indemnity, and the courts have so held. See *Hebert v. Blankenship*, 187 So. 2d 798 (La. App. 3d Cir. 1966), noted, 41 Tul. L. Rev. 957 (1967); *United Gas Corporation v. Guillory*, 206 F. 2d 49 (5th. Cir. 1953); *Auld v. Globe Indemnity Company*, 220 F. Supp. 96 (W.D. La. 1963).

The *Appalachian* decision was criticized and its rationale replaced in *Minyard v. Curtis Products, Inc.*, 251 La. 624, 205 So. 2d 422 (1967). That case transported into Louisiana law the *actio de in rem verso*, as developed in the French jurisprudence. According to the Minyard court:

> "... There are now five prerequisites to the successful suit by actio de in rem verso: (1) there must be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and resulting impoverishment, (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment, and finally (5) the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature."

Minyard has been criticized on the ground that the *actio* was incorrectly applied to the facts of that case. Comment, *Actio De In Rem Verso in Louisiana: Minyard v. Curtis Products, Inc.*, 43 Tul. L. Rev. 263 (1969); Litvinoff, *Work of Appellate Courts — 1967-1968, Obligations*, 29 La. L. Rev. 200 (1969); Note, 14 Loy. L. Rev. 434 (1968). Nevertheless, we believe that *Minyard v. Curtis Products, Inc.* 43 Tul. L. Rev. 263 (1969); *verso* a permanent part of the Louisiana law.

Because of our special finding that the Railroad was actually at fault, the claim for indemnity must fail under both the *Appalachian* and the *Minyard* theories. The cases cited earlier dispose of the *Appalachian* claim. With regard to the *Minyard* doctrine, we hold in particular that the fifth requirement, that of subsidiarity, is not met. This is so because both the Railroad and the third party defendants were actually at fault, so that the Railroad's rights, if any, are governed by the law of contribution, an existing remedy at law directed to the matter at issue which would

be defeated by application of the *actio de in rem verso*. *Minyard*, supra, 205 So. 2d at 433, see also: Comment, supra, 43 Tul. L. Rev. 263 at 303.

Furthermore, although the Railroad's compromise with Brenham impoverished the Railroad, the third party defendants experienced no enrichment as a result of the Railroad's payment. This is true because Brenham's claim against the third party defendants had prescribed even before this suit was filed against the Railroad. The third party defendants were relieved of their obligation, not through the Railroad's payment, but through the operation of prescription. And although these defendants were enriched when the obligation prescribed, this enrichment was not connected in any way with the Railroad's impoverishment.

Therefore, the claims for indemnity under the *Appalachian* and *Minyard* theories are denied.

Obligation to Procure Liability Insurance

One of the clauses in the contract of August 1, 1960, provides as follows:

> It is agreed that [Sutton Junk & Salvage Yards, Inc.,] will secure and keep in force during the term of this agreement, Public Liability Property Damage Insurance with maximum of not less than $100,000 for injury to or death of one person and $300,000 for injury to or death of more than one person in any one

> accident, and maximum of not less than $50,000 for loss of or damage to property ....

The Railroad argues that the obligation to procure liability insurance imposed upon Sutton's created an obligation to indemnify the Railroad. We cannot accept this argument as sound. In *Dorman v. T. Smith & Son, Inc.*, 55 So. 2d 587, 592-93 (La. App. Orl. 1951), affirmed, 223 La. 29, 64 So. 2d 833 (1953), Judge Janvier wrote:

> "Such insurance is obtained merely for the purpose of protecting the insured against loss where there is liability and cannot be accepted as creating liability which would not otherwise exist."

Although a similar clause was construed as creating an obligation to indemnify on the first hearing in *Truxillo*, supra, this issue was expressly pretermitted on rehearing.

Our own view is that while such a clause may be regarded as evidence of an intent to indemnify, it is not, standing alone, of sufficient weight to show a clear and unequivocal intent to indemnify one against his own negligence.

The claim for indemnity based on Sutton's obligation to procure liability insurance is therefore denied.

Contribution

In the alternative, the Railroad argues that it is entitled to contribution. Contribution in Louisiana is

based upon solidary liability, which the Civil Code defines as follows:

> Article 2091. There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor.

Article 2324 provides that joint tortfeasors are liable *in solido* to the injured person. The right to contribution is governed by Articles 2103 and 2104, which provide that the debt should be divided equally, and that the debtor who pays can recover from each of the codebtors his virile portion of the obligation.

The question which faces us is whether the Railroad, whose liability toward Brenham was imposed by the F.E.L.A., was bound *in solido* with the other defendants, whose liability toward Brenham was imposed by the Louisiana tort law. The F.E.L.A. bases the employer's liability on negligence, but in contrast to state law, this negligence is sufficient to invoke liability if it plays any part, *even the slightest*, in bringing about the damage. See *Phillips v. Houston Fire & Casualty Insurance Company*, 219 F. Supp. 420 (W.D. La. 1963). Also, contributory negligence is not a complete defense under the F.E.L.A., 45 U.S.C. § 53, although it is under Louisiana law. Furthermore, the prescriptive periods are different. See 45 U.S.C. § 56 (three years); Louisiana Civil Code Article 3536 (one year).

The only article of the Civil Code which seems to deal with the possible solidarity of dissimilar obligations is the following:

> Article 2092. The obligation may be *in solido*, although one of the debtors be obliged differently from the other to the payment of one and the same thing; for instance, if the one be but conditionally bound, whilst the engagement of the other is pure and simple, or if the one is allowed a term which is not granted to the other.

Thus, liability may be *in solido* although the debtors are "obliged differently," so long as they are bound for "one and the same thing."

As a practical matter, the Louisiana courts have been reluctant to find solidarity where the obligations are dissimilar. Most of these cases have involved claims for contribution from workmen's compensation employers, and it has almost uniformly been held that a workmen's compensation employer cannot be solidarily liable with a third party tortfeasor. These decisions rest either on the exclusive remedy provision of the Workmen's Compensation Act, La. R.S. 23:1021 *et seq.*, or on the dissimilarity of the obligations. The recent case of *Moak v. Link-Belt Company*, 229 So. 2d 395, 414 (La. App. 4th. Cir. 1969), *reversed in part*, ____ La. ____, 242 So. 2d 515 (1971), awarded a "quasi-contribution" to a third party tortfeasor up to the amount of the employer's maximum compensation liability, but the Louisiana Supreme Court was deprived of the opportunity to rule on the correctness of this

award by a compromise between the parties entered into before the issue came up for hearing. We cannot construe this decision, which is contrary to a long line of constant jurisprudence, as broadening Louisiana's previous policy of refusing to find solidarity in this situation.

The most relevant Louisiana case which we have found is *Rogers v. Stuyvesant Insurance Company*, 198 So. 2d 685 (La. App. 1st. Cir. 1967), writ granted, 251 La. 42, 202 So. 2d 655 (1967) (apparently settled prior to hearing in the Louisiana Supreme Court). In that case the court awarded contribution in favor of a third party against a Jones Act employer, on the ground that the basis for liability under the Jones Act was negligence. The court did not seem to be aware of, or at least did not discuss, the differences between negligence under the Jones Act and under Louisiana law. As is well known, the standards of negligence under the Jones Act are the same as under the F.E.L.A. The differences between F.E.L.A. negligence and Louisiana negligence were carefully delineated in *Phillips*, supra, where this Court found that an F.E.L.A. employer and a third party could not be joint tortfeasors under Louisiana law. Of course, *Phillips* is entitled to no weight as a pronouncement of state law, but its appreciation of negligence under the F.E.L.A. is entitled to perhaps more weight than the cursory treatment of Jones Act negligence in *Rogers*.

Faced with such a standoff, we naturally seek another way to resolve the controversy. Assuming, then, but not deciding, that the Railroad and the third party defendants were bound *in solido* toward Brenham, we

would nevertheless deny the claim for contribution under the facts of this case.

According to Pothier, the right to contribution is based on the equitable principle which does not allow the codebtors to enjoy, at the expense of the paying debtor, the *liberation from a debt* for which they were as much bound as he was.[1] Pothier, Treatise on the Law of Obligations 147 (Evans transl. 1826); Note, 43 Tul. L. Rev. 153, 157 (1968). The same idea was expressed in *Sincer v. Bell*, 47 La. Ann. 1548, 18 So. 755 (1895), where the court said:

> There could be, as between Sincer and Bell, no contribution arising out of that payment, for contribution, when admitted, is on the theory that payment by one discharges another also.

And indeed, the idea is expressed in the very definition of solidary obligations. Article 2091, supra. In the instant case, the obligation of the third party defendants toward Brenham had prescribed before Brenham filed his suit against the Railroad. These defendants had a perfect defense against Brenham, namely, prescription.[2] It is clear that the payment by the Railroad under its compromise with Brenham did not secure any release for these parties, who had already been released by the operation of prescription. An award of contribution would thus be unjustified.

---

[2]This is not to say that Southern Pacific's action against Sutton's for indemnity or contribution has prescribed. Here we speak only of the prescription applicable to Brenham's action against Sutton's.

Also relevant here is the case of *Fort Worth & Denver Railway Company v. Threadgill*, 228 F. 2d 307 (5 Cir. 1955), in which the court held that a railroad was not entitled to contribution where the third party had a perfect defense — contributory negligence — under Texas law. In the instant case, the jury found that Brenham's contributory negligence was not a proximate cause of the accident, it having contributed only 17% to the cause. We take this as an indication that this jury would not have held Brenham's claim against the third party defendants barred by contributory negligence. Nevertheless, we believe that under the *Threadgill* rationale, these defendants were entitled to assert their defense of *prescription* as to bar to the indemnity claim.

The claim for contribution is therefore denied.

For the foregoing reasons, judgment is rendered in favor of third party defendants, Sutton's Steel & Supply, Inc., Lionel H. Sutton, and Sutton Properties, Inc., and against third party plaintiff, Southern Pacific Company. Counsel for third party defendants will prepare a formal decree for signature in accordance with Rule 9(e) of this court, and submit same for signature forthwith. Judgment will not be entered until such decree is filed with the Clerk.

Lafayette, Louisiana, June 17, 1971.

/s/ R. J. PUTNAM
United States District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1387
Summary Calendar*

ROBERT O. BRENHAM,
Plaintiff,

versus

SOUTHERN PACIFIC COMPANY,
Defendant-Third-Party
Plaintiff-Appellant,

versus

SUTTON'S STEEL & SUPPLY, INC., ET AL,
Third Party
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

---

(June 9, 1972)

---

*Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: On the basis of the district court's well-reasoned opinion, reported at ____ F.Supp. ____, on the issue of whether appellant was entitled to the right of contribution from appellees in the instant case, we affirm. *Cf. United States v. Moore*, 3d Cir. 1972, ____ F.2d ____ [40 U.S.L.W. 1174, April 27, 1972]. *See also Phillips v. Houston Fire & Casualty Insurance Company*, W.D.La. 1963, 219 F. Supp. 420.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408 — 400 Royal St.
New Orleans, La. 70130
(504) 527-6514

August 15, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 72-1387 — Robert O. Brenham vs. Southern Pacific Co., vs. Sutton's Steel & Supply, Inc., et al

Gentleman:

You are hereby advised that the Court has today entered an order* denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
/s/ ALVIS M. WINCHESTER
Deputy Clerk

/amw
cc: Mr. Richard C. Meaux
Mr. William O. Bonin

---

*As to Southern Pacific Company